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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 312

JOEL SIMON MEYERS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Pursuant to Rule 58(2) of the Rules of this Court, petitioner respectfully prays for a rehearing of the order denying the petition for a writ of certiorari previously filed. The order denying the petition was entered on October 14, 1969.

Rehearing is sought on the grounds that cases not reported until after the filing of petitioner's supplemental brief substantially broaden the conflict between the decision of the court below and decisions of other circuits. In addition, a recently reported decision of the Second Circuit itself raises doubt as to whether the court below was fully aware of the implications of its decision.

These cases relate to the Allen charge, which was given by the trial court in this case under circumstances not ap-

proved, either alone or collectively, in any other reported case. The issue is discussed at length in the petition (pp. 10-16) and in petitioner's supplemental brief.

Petitioner urged that certiorari be granted because two circuits, in direct conflict with the decision below, had abolished use of the Allen charge. *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir. 1969), *cert. denied sub nom. Panaccione* v. *United States*, 28 U.S.L.W. 3128 (October 14, 1969); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), petition for certiorari filed, No. 551 Misc. Now two more circuits have discouraged use of the Allen charge.

In *Sullivan* v. *United States*, 414 F.2d 714 (9th Cir. 1969), the Ninth Circuit expressed "doubt that it is really any longer advisable to give the Allen instruction at all. . . ." *Id.* at 716. And the Tenth Circuit, in *United States* v. *Winn*, 411 F.2d 415 (1969), acknowledging the substantial criticism of the Allen charge, "cautiously approved" the charge, but thought it more appropriately "given before the jury initially retires." *Id.* at 416.

Thus, four circuits have adopted policies regarding the Allen charge which are either directly or implicitly in conflict with the decision of the Second Circuit in this case. Significantly, even the Second Circuit appears reluctant to acknowledge the circumstances under which it approved the giving of the Allen charge in *Meyers*. In *United States* v. *Barash*, 412 F.2d 26 (2d Cir. 1969), the court upheld an Allen charge against an argument that it was prematurely given—some thirteen hours after deliberations had commenced. After the court had indicated that the trial judge had acted within its discretion in so timing the charge, it added this noteworthy footnote:

> "The minimum limits as to prematurity in this court appear to have been established in *United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 . . . (1966), in which an Allen charge was given after the jury had deliberated for three hours and 45 minutes. . . . That case was saved from reversal by the 'barest margin'. . . . " *Id.* at 32, n. 11.

If a charge is saved from being premature by the "barest margin" when given after three hours and 45 minutes of deliberations, what of the Allen charge in this case, given only two hours and 50 minutes after the jury began deliberating. Since this fact was brought to the attention of the court in petitioner's brief to the Court of Appeals and was acknowledged by the court in mentioning the hours of the jurors' deliberations in its opinion, one can only assume that the Second Circuit will not use *Meyers* as its standard in determining minimum limits as to prematurity of an Allen charge.

In short, *Meyers* may simply be an anomaly among the Allen charge decisions, in conflict with some circuits, running counter to the trends in others, and even ignored by its own. It seems likely that its excesses will be duplicated by no other court and that in time all the circuits may follow the lead of the Third, Seventh, Ninth and Tenth Circuits in barring or discouraging the use of the Allen charge. Under these circumstances, the present conflict in the circuits would be resolved without the need for further comment by this Court. Unfortunately, that would leave standing the decision—and, more importantly, the sentence—in the case which had sanctioned the most extraordinary use of the Allen charge in its history.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the petition for rehearing be granted, that this Court vacate its prior order denying the petition for writ of certiorari, and grant the same, and for such other and further relief as may be just.

Respectfully submitted,

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Certificate of Counsel Under Rule 58

I, ALAN H. LEVINE, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that such petition is restricted to the grounds specified in Rule 58 of the Rules of this Court.

ALAN H. LEVINE